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Public Prosecutor v Ling Hang Tsyr

B HIGH COURT (SIBU) — CRIMINAL TRIAL NO SBW-45–3/2 OF 2015
NURCHAYA ARSHAD J
27 OCTOBER 2017

C *Criminal Law — Abetment — By conspiracy — Accused charged together with principal offender for abetting in committing murder under ss 109 and 302 of the Penal Code — Whether common intention established — Whether defence bare denial — Whether prosecution proved case beyond reasonable doubt — Penal Code ss 34, 107, 109, 300 & 302*

D The accused was charged with the offence of abetment by way of conspiracy to commit the murder of Wong Jing Kui ('the deceased'), an offence under ss 109 and 302 of the Penal Code ('the Code') read together with s 34 of the same Code. The deceased and the accused were husband and wife since December
E 2005 blessed with one son. The deceased was the manager of HSBC Bank while the accused was working as a credit recovery clerk in Hong Leong Bank. There were four insurances bought by the deceased. In 2010, the deceased bought the last insurance at RM70,000 where the beneficiary was the accused. In 2011, their marriage started to crack as the accused spent lesser time at home
F and allegations of extramarital affairs were thrown at each other. The deceased requested for a divorce but the accused rejected. They went to a marriage counselling course but failed. The accused turned to Andrew Tiong King Guan ('Andrew') for companionship. On 14 June 2012, Andrew offered Ling Hoe Ing ('PW5') to settle his debt in return for a killing deal. PW5 accepted the deal
G and killed the deceased at the marital home of the accused and the deceased. At about 12am–1am on the fateful day, Andrew instructed PW5 via text message to enter the house from the back door because it was not locked and there was no CCTV coverage. Andrew further gave instruction to PW5 to enter the master bedroom located on the first floor and stabbed him to death.

H **Held**, convicting the accused and sentencing the accused to death:

(1) There was no direct involvement between the accused and PW5 but was constructed by circumstantial evidence. The circumstantial evidence to
I link the accused to the crime was there was no break in; PW5 knew where to enter the house; Andrew knew all the details of the deceased's position; there were communications between Andrew and PW5 and Andrew and the accused before and after the murder; and reasons for the accused to do so was due to the pending divorce case and the insurance. The deceased wanted to seek custody of their child but the accused refused. The

accused made a claim to the insurance where she is the beneficiary a month after the death of the deceased (see paras 41, 43, 45 & 48–49).

(2) The death of the deceased was due to the act done by PW5 aided and abetted by Andrew and the accused by unlocking the back door for PW5 to enter. Based on the circumstantial evidence adduced, there was a conspiracy to murder the deceased and in furtherance of their common intention, the accused and Andrew had abetted the commission of the crime. The intention to commit murder was clearly shown because from beginning itself, Andrew was looking for a hired killer. There was no reason for Andrew to kill the deceased as they had no relations together but the accused that had connection with Andrew had reason to do so (see paras 50 & 53).

(3) The accused's defence that she and Andrew were just friends who only talk about work could not sustain because it was odd for someone who barely knew each other would invite them over to the house and have a sleep over what more for a married woman whose husband was away from home. Their relationship was more than just a bank customer and a casual friend as Andrew knew where the accused lived and had access to her home (see para 68).

(4) It was the evidence of the accused that the calls and text messages to Andrew were merely work purposes but exhs P84 and P85 showed otherwise proving that there was an active communication between them. The accused also did not provide an explanation for each call and text messages. There was nothing to suggest that she did the same to other customer. Therefore it was safe to infer that these active communications shows that they were in fact lovers. The accused's suggestion that the messages from 12.40am–1.21am were sent by the deceased was contradicted with PW5's evidence who said that he came to the house about 12am to 1am and the deceased was sleeping. This was supported by Stallone Lim Ming Yuh, the medical assistant's ('PW8') evidence who testified that the body was already at the state of rigor mortise. By looking at the records, ie, connections between accused and Andrew and the fact that they contacted each other before and during the night of the incident, it was safe to infer that the accused had involved in the plan to murder the deceased (see paras 69 & 71–73).

(5) The accused claimed that she was already asleep and the deceased was the one who forgot to lock the door. She explained that the deceased sometimes will go to the backyard of the house to hang his wet clothes and check the tank and water pump. However, exh P2 showed that there were no wet clothes an d there was no evidence to suggest that there was a problem with the water pump or tank. Hence, there was no reason for the deceased to go to the backyard of the house at an ungodly hour. PW5

also gave evidence that it was the accused who told Andrew that the back doors were unlocked (see paras 74–76).

(6) There was no evidence to suggest the 12.40am–1.21am text messages were about the suspicious relationship of Andrew and the accused hence it was only bare denial. This denial did not cast a doubt on the prosecution's case against the accused (see paras 75, 80 & 82).

(7) The defence claimed that the subsequent text messages was about the accused replying condolences messages from Andrew and also inquiry about work. There was no evidence to show that she also did the same to other customers she had. It appeared that she only made this up. Therefore, it was safe to infer that the subsequent text messages were not about work but a post-mortem discussion from the execution of the said murder (see para 83).

(8) The accused depended on the deceased financially. Hence, the murder plan was initiated after the deceased decided to proceed with the divorce. Therefore, there was a financial motive (see para 87).

(9) Even though the accused claimed that she loved the deceased, she did nothing to help him. She did nothing to stop the bleeding, did not approach the deceased instead she was still at the bed talking to him from afar giving moral support nor did she immediately call the police or ambulance or run to her neighbour for help. The accused claimed she was shocked and stunned but at the same time she can call her colleague and asked for the ambulance number rather than asking for help. There was no reason for her not helping the deceased when the danger was no longer there. Most importantly, if she loved her husband, she should not have started the affair with Andrew (see paras 91–92).

(10) The court was satisfied that the prosecution has proved its case beyond reasonable doubt. The accused was guilty of the offence charged. The accused was convicted and sentenced to death by hanging to the neck until death (see paras 94–96).

[Bahasa Malaysia summary

Tertuduh telah didakwa dengan kesalahan bersubahat dengan cara konspirasi untuk melakukan pembunuhan ke atas Wong Jing Kui ('si mati'), satu kesalahan di bawah s 109 dan 302 Kanun Keseksaan ('Kanun') dibaca bersama s 34 Kanun yang sama. Si mati dan tertuduh adalah suami isteri sejak Disember 2005 dan dikurniakan dengan seorang anak lelaki. Si mati adalah pengurus HSBC Bank manakala tertuduh bekerja sebagai kerani pemulihan kredit di Hong Leong Bank. Terdapat empat insurans yang dibeli oleh si mati. Pada tahun 2010, si mati membeli insurans terakhir bernilai RM70,000 dimana penerima yang berhak adalah tertuduh. Pada tahun 2011, perkahwinan mereka mula retak kerana tertuduh menghabiskan semakin kurang masa di

rumah dan tuduhan hubungan luar nikah dilemparkan antara satu sama lain. Si mati meminta untuk bercerai tetapi tertuduh menolak. Mereka menghadiri kursus kaunseling perkahwinan tetapi gagal. Tertuduh berpaling kepada Andrew Tiong King Guan ('Andrew') untuk persahabatan. Pada 14 Jun 2012, Andrew menawarkan Ling Hoe Ing ('PW5') untuk menyelesaikan hutangnya sebagai balasan perjanjian pembunuhan. PW5 menerima perjanjian tersebut dan membunuh si mati di rumah perkahwinan tertuduh dan si mati. Pada kira-kira 12 pagi dan 1 pagi pada hari malang tersebut, Andrew mengarahkan PW5 melalui teks mesej untuk memasuki rumah dari pintu belakang kerana ia tidak berkunci dan tiada liputan CCTV. Andrew terus memberikan arahan kepada PW5 untuk memasuki bilik tidur utama yang terletak di tingkat pertama dan menikamnya sehingga mati.

Diputuskan, mensabitkan tertuduh dan menjatuhkan hukuman mati:

(1) Tiada penglibatan langsung antara tertuduh dan PW5 tetapi telah dibina oleh keterangan ikut keadaan. Keterangan ikut keadaan untuk menghubungkan tertuduh kepada jenayah adalah tiada pecah masuk; PW5 mengetahui di mana untuk memasuki rumah; Andrew mengetahui semua butiran si mati; terdapat komunikasi antara Andrew dan PW5 dan Andrew dan tertuduh sebelum dan selepas pembunuhan; dan sebab-sebab untuk tertuduh melakukannya adalah disebabkan kes perceraian yang belum selesai dan insurans. Si mati ingin menuntut hak jagaan anaknya tetapi tertuduh menolak. Tertuduh membuat tuntutan insurans dimana tertuduh adalah penerima yang berhak satu bulan selepas kematian si mati (lihat perenggan 41, 43, 45 & 48–49).

(2) Kematian si mati adalah disebabkan perbuatan PW5 yang dibantu dan bersubahat oleh Andrew dan tertuduh dengan membuka kunci pintu belakang untuk PW5 masuk. Berdasarkan keterangan ikut keadaan yang dikemukakan, terdapat konspirasi untuk membunuh si mati dan dalam penerusan niat bersama mereka, tertuduh dan Andrew telah bersubahat perlakuan jenayah tersebut. Niat untuk melakukan pembunuhan jelas ditunjukkan kerana dari awalnya, Andrew telah mencari seorang pembunuh upahan. Tiada alasan untuk Andrew untuk membunuh si mati kerana mereka tidak mempunyai hubungan bersama tetapi tertuduh yang mempunyai kaitan dengan Andrew mempunyai sebab untuk berbuat demikian (lihat perenggan 50 & 53).

(3) Pembelaan tertuduh bahawa tertuduh dan Andrew hanyalah sahabat yang berbual tentang kerja tidak dapat diterima kerana adalah aneh untuk seseorang yang hampir tidak saling mengenali untuk menjemput mereka ke rumah dan bermalam tambahan lagi untuk seorang wanita yang sudah berkahwin yang suaminya tiada di rumah. Hubungan mereka adalah lebih dari seorang pelanggan bank dan kawan biasa kerana Andrew mengetahui dimana tertuduh tinggal dan memiliki akses ke

rumah tertuduh (lihat perenggan 68).

(4) Adalah keterangan tertuduh bahawa panggilan dan teks mesej kepada Andrew hanyalah untuk urusan kerja tetapi eksh P84 dan P85 menunjukkan sebaliknya membuktikan bahawa terdapat komunikasi aktif antara mereka. Tertuduh juga tidak memberikan penjelasan bagi setiap panggilan dan teks mesej. Tiada yang menunjukkan bahawa tertuduh melakukan perkara yang sama kepada pelanggan yang lain. Oleh itu adalah selamat untuk menyimpulkan bahawa komunikasi aktif ini menunjukkan bahawa mereka sebenarnya pasangan kekasih. Saranan tertuduh bahawa mesej-mesej dari pukul 12.40 pagi hingga 1.21 pagi adalah dihantar oleh si mati bertentangan dengan keterangan PW5 yang menyatakan bahawa beliau datang ke rumah pada kira-kira 12 pagi hingga 1 pagi dan si mati sedang tidur. Ini disokong oleh Stallone Lim Ming Yuh, pembantu perubatan ('PW8') yang memberi keterangan bahawa mayat sudah berada dalam keadaan rigor mortis. Dengan melihat rekod, iaitu, hubungan antara Andrew dan hakikat bahawa mereka berhubung dengan antara satu sama lain sebelum dan selepas malam kejadian, adalah selamat untuk menyimpulkan bahawa tertuduh telah terlibat dalam rancangan untuk membunuh si mati (lihat perenggan 69 & 71–73).

(5) Tertuduh mendakwa bahawa beliau sudah tidur dan si mati yang lupa untuk mengunci pintu. Tertuduh menjelaskan bahawa si mati kadang-kadang akan pergi ke halaman belakang rumah untuk menyidai pakaian basah beliau dan memeriksa tangki dan pam air. Walau bagaimanapun, eksh P2 menunjukkan bahawa tiada pakaian basah dan tiada bukti untuk mencadangkan terdapat masalah dengan pam air atau tangki. Oleh itu, tiada sebab untuk si mati untuk ke halaman belakang rumah pada waktu yang keterlaluan. PW5 juga memberikan keterangan bahawa tertuduh yang memberitahu Andrew yang pintu belakang tidak berkunci (lihat perenggan 74–76).

(6) Tiada bukti yang menunjukkan teks mesej pada pukul 12.40 pagi hingga 1.21 pagi adalah tentang hubungan mencurigakan Andrew dan tertuduh oleh itu ianya hanya penafian semata-mata. Penafian ini tidak menimbulkan keraguan atas kes pendakwaan terhadap tertuduh (lihat perenggan 75, 80 & 82).

(7) Pihak pembelaan mendakwa bahawa teks mesej berikutnya adalah berkenaan tertuduh membalas mesej takziah daripada Andrew dan juga pertanyaan mengenai kerja. Tiada bukti untuk menunjukkan tertuduh melakukan perkara yang sama terhadap pelanggan lain yang beliau ada. Ia kelihatan bahawa tertuduh hanya mereka-reka cerita. Oleh itu, adalah selamat untuk menyimpulkan bahawa teks mesej berikutnya bukan tentang kerja tetapi perbincangan *post-mortem* daripada pelaksanaan pembunuhan tersebut (lihat perenggan 83).

(8) Tertuduh bergantung kepada si mati secara kewangan. Dengan itu, rancangan pembunuhan tersebut dimulakan selepas si mati memutuskan untuk meneruskan perceraian. Oleh itu, terdapat motif kewangan (lihat perenggan 87).

(9) Walaupun tertuduh mendakwa bahawa beliau menyayangi si mati, tertuduh tidak berbuat apa-apa untuk menolong si mati. Tertuduh tidak melakukan apa-apa untuk menghentikan pendarahan, tidak mendekati si mati sebaliknya tertuduh masih berada di katil bercakap dengan si mati dari jauh memberikan sokongan moral dan tidak menelefon polis atau ambulans atau bergegas kepada jiran untuk mendapatkan bantuan. Tertuduh mengaku beliau terkejut dan terpegun tetapi pada masa yang sama tertuduh boleh menghubungi rakannya dan meminta nombor ambulans bukannya meminta bantuan. Tiada alasan bagi tertuduh untuk tidak membantu si mati apabila bahaya tiada lagi di situ. Paling penting, jika tertuduh mencintai suaminya, tertuduh tidak sepatutnya memulakan hubungan dengan Andrew (lihat perenggan 91–92).

(10) Mahkamah berpuas hati bahawa pendakwaan telah membuktikan kes melampaui keraguan munasabah. Tertuduh bersalah atas kesalahan yang didakwa. Tertuduh telah disabitkan dan dihukum mati dengan gantung di leher sampai mati (lihat perenggan 94–96).]

Notes

For cases on by conspiracy, see 4(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 4–9.

Cases referred to

Chandrasekaran & Ors v PP [1971] 1 MLJ 153; [1970] 1 LNS 11 (refd)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232; [1983] 2 CLJ 10, FC (refd)
Khoon Chye Hin v PP [1961] 1 MLJ 105b, CA (refd)
Mohamed bin Kasdi v PP [1969] 1 MLJ 135 (refd)
Mohd Johi bin Said & Anor v PP [2005] 5 MLJ 409; [2005] 1 CLJ 389, CA (refd)
Mr Losali v PP [2011] 4 MLJ 694; [2011] 1 LNS 501 (refd)
Pendakwa Raya v Mohd Radzi bin Abu Bakar [2005] MLJU 504; [2006] 1 CLJ 457, FC (refd)
PP v Azilah bin Hadri & Anor [2015] 1 MLJ 617; [2015] 1 CLJ 579, FC (refd)
PP v Hanif Basree bin Abdul Rahman [2007] 2 MLJ 320, CA (refd)
PP v Ling Tee Huah [1982] 2 MLJ 324; [1980] 1 LNS 212 (folld)
PP v Saimin & Ors [1971] 2 MLJ 16 (refd)
Sunny Ang v PP [1966] 2 MLJ 195; [1965] 1 LNS 171, FC (refd)

Legislation referred to

Criminal Procedure Code s 180(1)
Evidence Act 1950 s 60
Penal Code ss 34, 107, 109, 300, 302

Mohd Fillany bin Siji (Public Prosecutor, Attorney General's Chambers) for the applicant.
Roger Chin (Lim Heng Choo with him) (Lim & Lim Advocates) for the respondent.

Nurchaya Arshad J:

[1] The charge:

> That you together with one person who is still at large namely Tiong King Guan (IC NO: 861110-52-6121), on 14th June 2012 at about 1:30 a.m, at house No 1D, Lorong 33A, Ulu Sg Merah, Sibu, in the District of Sibu in the State of Sarawak, in furtherance of common intention, by way of conspiracy, abetted one Ling Hoe Ing (IC NO: 810119-13-5215), which offence was committed in consequence of your abetment, and that you have thereby committed an offence punishable under Section 109 and Section 302 of the Penal Code read together with Section 34 of the same Code.

BACKGROUND OF CASE

[2] Wong Jing Kui ('the deceased') and Ling Hang Tsyr ('the accused') are husband and wife. They got married in December 2005 and were blessed with one son by the name of Joshua Wong.

[3] The deceased was the manager of HSBC Bank at Sibu prior to his death. Meanwhile, the accused was working as a credit recovery clerk in Hong Leong Bank.

[4] In 2011, cracks began to emerge in their marriage as the accused spent lesser time at home. There were also allegations of extramarital affairs thrown at each other which made the situation more difficult to restore.

[5] The deceased eventually requested for a divorce but was rejected by the accused. The accused persuaded the deceased to attend marriage counselling course conducted by a church in Sibu. The deceased was reluctant to attend the said course but after much persuasion, he finally gave in.

[6] The marriage counselling was proven to be a failure to them. They failed to get to the root of their conflict and the deceased insisted to end their

marriage. The deceased also threatened to bring their matter to court if she disagrees to the divorce. In the end, the accused came to terms to the idea of divorce.

[7] Feeling depressed over the fate of the accused's marriage, she turned to Andrew Tiong King Guan ('Andrew') for companionship. Andrew is a second hand car salesman. His nature of job required him to do account status checks with the bank where the accused was working. Other than that, he is also a runner for any JPJ summonses.

[8] On the 14 June 2012, a person by the name of Ling Hoe Ing was offered by Andrew to settle his debt in return for a killing deal. Ling Hoe Ing took up the deal and along with other information regarding the deceased. The killing took place at the marital home of the accused and the deceased. At about 12–1am on the fateful day, Andrew instructed Ling Hoe Ing via text message to enter the house from the back door because it was not locked and there were no CCTV coverage.

[9] Andrew then gave further instruction to Ling Hoe Ing to enter the master bedroom located on the first floor. He saw the deceased sleeping on the floor and stabbed him. Once the job was over, he exited the house using the same route that he went in and informed Andrew that the task had been executed.

[10] Andrew did not believe that the job had been completed. So, both of them went back to the crime scene but the police team and ambulance were already there.

[11] Ling Hoe Ing had asked Andrew about the debt and was told by Andrew that he will have to wait for the payment from the insurance.

[12] The deceased was pronounced dead upon the police's arrival at the scene of the crime. The accused together with one other who is still at large is charged for abetted one Ling Hoe Ing by way of conspiracy to commit the murder an offence under ss 109 and 302 of the Penal Code read together with s 34 of the same Code.

[13] The case went for trial where 22 prosecution witnesses were called to testify. At the end of the prosecution's case, the court held that the prosecution had successfully proven a prima facie case against the accused and she was ordered to enter her defence under ss 109 and 302 of the Penal Code together with s 34 of the same Code.

[14] The accused elected to give evidence of sworn testimony. There was also another defence witness who gave evidence. At the end of the defence's case, the court found that the prosecution had successfully proven the case beyond reasonable doubt. The accused was found guilty as charged, convicted and sentenced to death by hanging to the neck until death.

[15] The appeal now is against both conviction and sentence;

THE PROSECUTION'S CASE

[16] The deceased, Wong Jing Kui was a branch manager of HSBC Bank Sibu earning a good salary. His wife, the accused in this case was a credit recovery clerk at Hong Leong Bank Sibu earning RM2,800 per month.

[17] Law Boh Ing ('PW13') is the mother of the deceased. She testified that his son and the accused got married in 2005 and were blessed with a son by the name of Joshua. Both deceased and the accused were residing with PW13 at No 11C, Brooke Drive 31 before the couple bought a house in Ulu Sungai Merah. They moved to the new house in April 2011.

[18] According to PW13 and her sister Law Poh Lang PW14, the couple's began to have problems in their marriage soon after their move to the new house. This was confirmed by Ting Tiong Pang ('PW18') who is aware of the problem as he had received a call from the accused in 2011 complaining about her husband's late night drinking session. The deceased on the other hand also expressed dissatisfaction towards his wife who also had late night outs with her friends.

[19] Throughout the couple's standoff, the deceased befriended with a lady by the name of Elizabeth Ling. PW18 is aware of the deceased's friendship with this lady as the deceased once went to Thailand together with Elizabeth Ling and PW13 in the same trip. Meanwhile, the accused befriended with Andrew.

[20] According to Hii Yu Leong ('PW17'), a good friend of the accused, there were a few occasions where she went out with the accused and Andrew for tea, dinner and karaoke session together. There was once where the accused brought along his son for dinner with Andrew and PW17.

[21] Over the months, the accused's friendship with Andrew progressed from just mere friends to lover. This was witnessed by Yii Kong Ing ('PW16') who is a friend of Andrew. He had known Andrew for six months before the murder case. He claimed that there were few episodes where they hang out

together with the accused. PW17 also had been to the accused's house for a beer drinking session and had caught the accused and Andrew kissing. They also had a sleep over at the accused's home.

[22] PW13 testified that while the deceased went travelling, the accused had visitors in their home. One night, she passed by her son's home and saw three cars that she does not recognise. There was a white car, a black car and a red car parked outside the house. Out of curiosity, she brought along her sister, PW14 and purposely passed by the deceased's home at midnight and the next day. PW14 also confirmed that there were three cars parked at the couple's home and saw a man came out from the house and proceeded to the red Hyundai Getz with the plate registration QSM259. The said man was PW16 as he affirmed in his evidence that the red Hundai Getz with the registration No QSM 259 belonged to him and PW17 also confirmed to the court that the Black Hyundai Getz belonged to Andrew.

[23] Three months before the murder case, PW13 testified that there was a family discussion about the couple's marriage life and this was corroborated by Wong Tuong Toh, counselling pastor, PW15 who confirmed that the couple attended a marriage course conducted in the church where he was working on 28 March 2012. He also confirmed that the couple only attended two sessions.

[24] In May 2012, about two months before the murder case, the accused called up PW18 to borrow RM50,000 for gold investment business but was declined by PW18. Sometimes after, the accused called PW18 again to borrow RM30,000 and this time PW18 told her that he does not have that much money and this was confirmed by PW16 who testified that there was at one time where the accused confided to him about her financial status and the need to borrow RM5,000 to pay for house instalments in return for the sum to be paid back within a year plus additional 10%.

[25] A month before the incident, PW13 testified that the deceased wanted to sell the house and move back in with her and the IO of this case DSP Yeoh Chun Shyan, PW21 confirmed that the house was sold prior to the incident but the buyer did not pay the balance of RM20,000 hence the couple did not hand over the house key to the new owner.

[26] During the accused's lifetime, there were four insurance bought by the deceased. The first insurance was bought in April 2006 from Law Boh King, PW22 insured at RM500,000 where the beneficiary is the accused. Subsequently the insurance was reduced to RM200,000 and deactivated in 2009. PW22 and PW21 confirmed that the accused is unaware of the policy termination. The second insurance was a medical insurance for the accused amounting to RM125,000 but that too was terminated. The third insurance

was bought from PW18 at RM50,500 where the beneficiary is the accused but on the 13 March 2012, the deceased changed the beneficiary to his mother PW13 and PW21 confirmed that the accused is not aware of the changes. The last insurance was bought in 2010 from PW22 at RM70,000 where the beneficiary is the accused. However PW21 confirmed that the accused's claim for this insurance was put on hold as the company are waiting for the trial result.

[27] On the other side of the fence, Wong Miew Woon PW9 was offered a deal by Andrew. PW9 had known Andrew for five years in the diesel business. Andrew showed him a photostate picture of a person, a house and a car. Andrew offered RM28,000 plus 5% KTV share to kill the person in the picture. PW9 declined the offer as he has an aged mother to care for and in return Andrew gave RM1,000 to him and instructed him not to disclose this deal to anyone. Andrew also instructed him to look for other people to take up the deal and that's when he approached the brothers Sia Ung Hee ('PW10') and Sia Ung YU ('PW11'). The brothers on the hand were more interested in cheating Andrew. When both of them were told by Andrew himself that the deal was a killing job, they pretended to be interested in the deal but in reality, they cheated Andrew instead as both of them had no intention of killing anyone. They also introduced Andrew to Ling Hoe Ing ('PW5').

[28] PW5 has a serious gambling debt with his boss. He was being pressured by his financial disability so he took up the offer in return that Andrew would settle his debt. PW5 had no other information about the man he was about to kill except he was informed of the address he was residing and his car. Prior to the killing job, he prepared himself some gloves and a knife. On the 14 June 2012, he rode with his own motorcycle to the crime scene. It was about 12–1am in the morning. According to PW5, Andrew instructed to text him if he entered the house. He climbed over the fence and entered the house from the backdoor as Andrew told him that the backdoor was unlocked and there's no CCTV coverage. Andrew also gave specific information as to where the deceased was sleeping. So PW5 went upstairs to the first floor, entered the master bedroom which was not locked and used the Nokia hand phone light for a better lighting and that's when he saw the deceased sleeping on the mattress on the floor. Since the deceased fits profile of the person that he was instructed to kill, he proceeded to stab him using the knife on the throat, chest, his back and his thigh. The deceased resisted the fight and a struggle took place. Eventually the job was carried out. He went out from the same route he went in except he used the stool which he got from the back of the kitchen to climb over the fence. Thereafter, he went back home, bundled his clothes and threw them in the dustbin. He also informed Andrew that he had completed the task. They then met at Rejang Park where he was given an amount of cash.

[29] PW13 and Lau Chek Hing PW22 were informed of the situation at the couple's home. PW22 went together with his wife, his son and his elder brother. Upon reaching the crime scene, PW22's elder brother and son went upstairs and his son shouted and instructed PW22 to go upstairs and that was when he saw the floor of the master bedroom was in a pool of blood. He then placed his finger near deceased's nose to feel his breathing but found that the deceased no longer breathing and his chest no longer heaving. Both of deceased's hands were stiff. His belongings like wallet and his spectacles were placed nicely beside his bed. He also discovered that the emergency door (fire escape door) in front of the master bedroom was unlocked. PW13 walked to the back of the house and saw the glass door and the metal door unlocked and the door to the dining opened. She also discovered a blue plastic stool outside which was normally in the house. PW22 called the police at 1.46am meanwhile the accused notified the hospital. Police arrived around 2.10am and ambulance at 2.15am.

[30] Corporal Abdull Halim bin Darus, the police officer on duty was informed by the headquarters about a situation in Ulu Sungai Merah. In the crime scene, he saw a man lying down with a pool of blood on the floor. The ambulance personnel informed that the man had died. He then took a yellow police tape to cordon the place and informed SIO and PW21. Fifteen minutes later PW21 arrived.

[31] Stallone Lim Ming Yuh, the medical assistant ('PW8') received a call about 1.46am from his colleague about an emergency situation at the deceased's house. He reached the place at 2.05am. Two minutes later, the policeman in charge gave instruction for him to examine the victim. The victim was lying on the floor with a pool of blood. When he examined the victim, he had no detectable pulse and when he used the stethoscope to hear the breathing of victim, there was no chest movement and the airflow on the chest cannot be heard. The pupil of the eyes also has no movement. That was when he and his colleague confirmed the death of the victim. Since the death occurred at the crime scene, the medical assistant handed it over to the police. From his examination, the victim died more than an hour and less than two hours.

[32] The post-mortem was conducted on the 18 June 2012 by Norliza bin Ibrahim, PW6 on the body of the deceased after it was duly identified by deceased's wife. The cause of death of the deceased as certified by the pathologist was a result of stab wounds to the neck and chest as transpired in exh P29.

A EVALUATION AND FINDINGS AT END OF THE PROSECUTION'S CASE

[33] It is incumbent upon the court at the end of the prosecution's case to evaluate the evidence led by the prosecution to determine whether the prosecution has proven a prima facie case. This is enjoined in the statutory provision contained in s 180(1) of the Criminal Procedure Code which states that: 'When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a primafacie case against the accused'.

[34] In the Federal Court case of *Pendakwa Raya v Mohd Radzi bin Abu Bakar* [2005] MLJU 504; [2006] 1 CLJ 457 the duty of the court in determining whether the burden of prima facie had been discharged was spelled out as follows:

> This requires the court to undertake a maximum evaluation of the prosecution evidence when deciding whether to call on the accused to enter upon his or her defence. It involves an assessment of the credibility of the witnesses called by the prosecution and the drawing of inferences admitted by the prosecution evidence. Thus, if the prosecution evidence admits of two or more inferences, one of which is in the accused's favour, then i t is the duty of the court to draw the inference that is favourable to the accused. See, *Tai Chai Keh v Public Prosecutor* [1948–1949] supp MLJ 105b; *Public Prosecutor v Kasmin bin Soeb* [1974] 1 MLJ 230. If the court, upon a maximum evaluation of the evidence placed before it at the close of the prosecution case, comes to the conclusion that a prima facie case has not been made out, it should acquit the accused.

[35] To determine whether the prosecution has succeeded in proving a prima facie case it is pertinent to consider the ingredients of an offence of abetment and to do so it is pertinent to look at s 107 of the Penal Code.

[36] Section 107 of the Penal Code reads 'A person abets the doing of a thing who —':

> (b) engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

[37] Further, whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

[38] Section 300 of the Penal Code defines 'murder' as:

> Except in the cases hereinafter excepted, culpable homicide is murder —

(a) if the act by which the death is caused is done with the intention of causing death;

(b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

(c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

(d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

[39] Anyone commits murder will be punished with death pursuant to s 302 of the Penal Code.

Element 1: That the accused abetted the offence

[40] The charge preferred in this case focusing on the second limb of s 107 of the Penal Code ie, abetment by way of conspiracy. In *Chandrasekaran & Ors v Public Prosecutor* [1971] 1 MLJ 153; [1970] 1 LNS 11, Raja Azlan Shah J (as His Highness then was) commented as follows:

> Conspiracy is defined in s 120A of the Penal Code. In order to constitute the offence of abetment by conspiracy, there must be a combination of two or more persons to do, or cause to be done, an illegal act, or an act, which is not illegal, by illegal means and that act or omission must take place in pursuance of that conspiracy and in order to the doing of that thing. It is not necessary that the abettor should himself be directly involved as a participant in the offence committed.

[41] In this case, there was no direct involvement between the accused and PW5. The case was constructed by circumstantial evidence.

[42] In *Public Prosecutor v Azilah bin Hadri & Anor* [2015] 1 MLJ 617; [2015] 1 CLJ 579, the Federal Court had this to say at para 119, at p 36 (MLJ); p 653 (CLJ):

> ... in the absence of direct evidence, the prosecution may resort to adducing circumstantial evidence to discharge its burden. Crimes are usually committed in secret and under condition where concealment is highly probable. If direct evidence is insisted under all circumstances, a successful prosecution of vicious criminals, who have committed heinous crimes in secret or secluded places, would be near impossible ...

A EVIDENCE TO LINK THE ACCUSED TO THE CRIME. CIRCUMSTANTIAL EVIDENCE

There was no break in

B **[43]** It was the evidence of PW13 that the sliding door at the back was unlocked. Her evidence is supported by the IO, PW21 after his investigation where it was revealed that in order to have access to the room at the kitchen from the back, there were two doors, one from the hall right in front of the bed room and the second door to get to the kitchen is from the outside stated 'pintu C belakang' No 16 and 17 even if the accused or the deceased have not locked the door as shown in picture 10, the murderer would not have entered the house without unlocking the grill and sliding door as labelled No 16 and 17 in exh P40.

D *How did PW5 know where to enter and so forth?*

[44] In this case, PW5 was hired by Andrew Tiong to kill the deceased. PW5 was heavily in debt because of gambling. Andrew Tiong promised to settle the E debt for PW5 if he took up the killing deal. PW5 upon instruction via SMS from Andrew went to the deceased's house from the back door. Andrew told PW5 that the back door was unlocked. There was also no CCTV coverage as informed by Andrew Tiong. PW5's next course of action is depended upon Andrew Tiong's instruction. PW5 testified that the deceased's wife messaged F Andrew informing him that the bedroom door was not locked. It was also the evidence of PW5 that Andrew Tiong told PW5 that the deceased will be sleeping on the mattress. The detail of this kind is not by coincidence. Someone in the house must have revealed the whereabouts of the deceased and that someone is no other than the accused herself.

G *How did Andrew know all these details?*

[45] It was the evidence of PW16 and PW17 that the accused and Andrew H were close. PW16 even saw them kissing in her own house. This clearly shows that they were lovers and only lovers will share private and personal details. As what PW5 had testified that he knew all these from Andrew. Andrew on the other hand must have known the whereabouts of the deceased from the accused herself. If the accused did not reveal the deceased's position, Andrew I will not know these details hence PW5 will be unable to do the job as smooth as what he did in this case.

There were communications between Andrew and PW5 and Andrew and accused before and after the murder

[46] The message conversation between the PW5 and Andrew, Andrew and the accused also heightened one hour to few minutes before and after the murder took place. This fact was corroborated by exh P85 (call log and SMS between accused and Andrew), exh P84 (call log and SMS between Andrew and the accused and Andrew and PW5). There was also no dispute to the fact that the Nos 0146800591 and 0168896656 were used by Andrew Tiong, 0168606393 was used by Ling Hang Tsyr, the accused and 0165791292 was used by PW5. On the 13 of June, a day before Andrew contacted the accused 16 times between 10.08am–11.51pm. PW5 contacted Andrew nine times between 12.59am–11.37pm. The accused contacted Andrew 18 times between 8.11am–10.54pm. On the 14 of June, few minutes to the crime, Andrew contacted the accused 18 times from 12.07am–1.23am and PW5 contacted Andrew ten times between 12.50am–2am. Accused contacted Andrew 20 times between 12.40am–1.21am. It shows that the three were in contact and Andrew acted as an intermediary.

Does the accused have reasons to do so? The pending divorce case

[47] There was a divorce application pending in court and she may lose everything financially including her child.

[48] She had a marriage problem that may end in divorce and this fact is known to PW13, PW14 and PW18. It was also the evidence of PW21 that there was a pending divorce case in the court and the deceased wanted to seek custody of the child but the accused refused.

Does the accused have reasons to do so? The insurance

[49] The evidence of PW21, PW22 and PW18 revealed that she was the beneficiary to a few insurance policies insured at RM70,000, RM500,000 and RM50,500 bought by her late husband but one of the insurance policies lapsed, one policy beneficiary was changed to PW13 (during the couple's standoff). However, the accused may not be aware of these changes. Furthermore, she made a claim to one of the insurance where she is the beneficiary a month after the death of her husband but the claim was put on hold pending outcome of the trial. This fact corroborates the evidence of PW5 where he was told by Andrew to wait for the Insurance claim.

Element 2: That the abetted offence was committed in consequence of the abetment

[50] In this case the deceased has died. There was a report lodge about an attack towards the deceased (exh P1). PW8 confirmed deceased's death. A post-mortem was conducted by PW6 to determine his death. PW6 conducted post-mortem and informed the court that the cause of death was due to stab

wounds on the neck and chest (exh P29) The death of the deceased was due to the act done by the PW5 aided and abetted by Andrew Tiong and the accused.

[51] In the case of *Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195; [1965] 1 LNS 171, the accused was charged with the murder of his lover by allowing her to dive in unsafe waters. The prosecution led evidence to show that the accused was a bankrupt and had taken life insurance policies in which the accused was the beneficiary. The accused made a claim with the insurance company within 24 hours after her disappearance. Basing on the circumstantial evidence the court convicted and sentenced the accused to death. The trial judge in his summing up and as quoted by the Federal Court at p 198 stated:

> The second question to which I must draw your attention is that the question in this case, depending as it does on circumstantial evidence, is whether the cumulative effect of all the evidence leads you to the irresistible conclusion that it was the accused who committed this crime. Or is there some reasonably possible explanation such, for example, Was it an accident? ...
>
> Now, as I told you earlier on, one of the points about circumstantial evidence is its cumulative effect. Any one of these points taken alone might, you may think, be capable of explanation. The question for you is: where does the totality of them, the total effect of them all, lead you to? Adding them together, considering them not merely each one in itself, but altogether, does it or does it not lead you to the irresistible inference and conclusion that the accused committed this crime? Or is there some other reasonably possible explanation of those facts?
>
> The prosecution case is that the effect of all this evidence drives you inevitably and inexorably to the one conclusion and one concluding only: that it was the accused who intentionally caused the death of this young girl.

[52] It is safe to say that the accused indeed aiding and abetting murder against her own husband by unlocking the back door for PW5 to enter. It is hard to believe someone who would purposely left the back door unlocked. The court rejected the argument by the defence counsel that the deceased who had forgotten to lock it as the call and SMS logs as per exhs P84 and P85 on the fateful day indicates that the accused is very much awake minutes to the murder. Infact, she is very awake at the time of the murder as PW8 testified that the victim had passed away more than an hour and less than two hours. Taking into account the alleged time of offence at 1.30am, the time the medical assistant reached at the crime scene (2.15am) and evidence of PW8, it is safe to say that the victim had died between 12am–1am. Meaning at that time of the incident, the accused was awake and was in contact with Andrew as the last communication from accused to Andrew is at 1:21am!

[53] Based on the circumstantial evidence adduced, there was a conspiracy to murder the deceased and in furtherance of their common intention, the accused and Andrew had abetted the commission of the crime. Looking at the

facts as a whole, it clearly shows the intention to commit murder or inflict body injuries that was sufficient in its ordinary course of nature to cause death because from beginning itself, Andrew was looking for a hired killer. Andrew and the deceased had no relations or business together thus no reason for Andrew to kill him. Andrew is not known to the circle of friends of the deceased or deceased's family. The only connections that put the pieces together are the accused and only the accused that has connection with Andrew and has reason to do so.

[54] Therefore, a prima facie case has been established against the accused under ss 109 and 302 of the Penal Code. On account of the above, this court had therefore ordered the accused to enter her defence to the charge preferred against her. The three alternatives were explained to the accused that she can choose to remain silent, give evidence-under oath or make an unsworn statement from the dock and the accused elected to give evidence of sworn testimony.

THE DEFENCE'S CASE

[55] The accused chose to give sworn evidence and it is summarised as follows: The accused had known the deceased for five years before she married him on 31 December 2005. The first five years of their marriage, they were staying with the deceased's mother in law before they moved to their own house at No 1D, Lorong Ulu Sungai Merah 33A, Sibu. The house was bought under accused's name. The first payment of the house of RM30,000 was given by her father and the rest was by bank loan instalments. The accused paid RM900 monthly instalments. Prior to the incident, the accused work as a credit recovery clerk earning RM2,800. The marriage soon began to have problems with her husband entertaining clients till late at night and this goes on up to the point that her late husband insisted for a divorce but was not agreeable to the accused. The accused tried to save their marriage by attending marriage counselling course but *the they* failed to reconcile. The accused also befriended with Andrew and she claimed that their relationship was only cordial and nothing beyond that. She also claimed that she would never allow herself to be seen alone together with Andrew even when she invited him over to her house.

[56] On the day prior to the murder, like any other normal days, she would pick up her son at 6pm and brought him to Giant Supermarket at Ulu Sungai Merah After she did her groceries, she would let her son play at the indoor playground. They reached home at 8.30pm, did some housework and prepared for bed by 10pm. Before she went to bed, she called Andrew to remind him about his car instalment. She then charged her hand phone and went to sleep.

She denied communicating with Andrew minutes before the murder and alleged that it may have been her husband who is suspicious of her as there were incidents like this before.

[57] It is her normal routine to lock the sliding door before bed but it is also a habit for her husband to have his shower at the toilet downstairs in the middle of the night. They don't use the toilet upstairs for ease of house cleaning. It is her husband's routine to hang out wet clothes at the backyard after his shower or check the water pump. The accused claimed that there were occasions where her husband had forgotten to lock the kitchen door and sliding door as he was too drunk.

[58] While she was sleeping, she was awakened by the loud shout of her husband. She saw two figures in the room. She was afraid and cuddled her son. Her son called out for his father but she pulled him under the blanket for fear of being attacked. After she heard the door being closed, she uncovered the blanket and put on her spectacles and was shocked to see her husband covered in blood. While she was calling her mother in law and uncles for help, she tried supporting and keeping him alert before the ambulance arrived. Not long after, the family from her husband side came, the police and ambulance also arrived. The medical attendant went upstairs to examine her husband and within minutes came down and said sorry to her. Everything was chaotic at that time. She remembered the police team carried down a black plastic and immediately she knew it was her husband in it.

[59] Since her husband's passing, the house, the car has been repossessed and sold off. She claimed that she did not benefit anything from the marriage except for her son. She denied submitting insurance claim right after the incident. She was transferred to Kuching a month later.

[60] The father of accused testified as a second defence witness. He claimed that the accused had asked him RM30,000 for house down payment and he gave the money to her as a gift. He was aware of her daughter's marriage problem and had advised her to solve the problem with her late husband and also suggested to her to go for counselling course. He denied ever being paid back the RM30,000 by the son in law and he was not aware of her daughter's relationship with Andrew.

EVALUATION AND FINDINGS AT END OF DEFENCE'S CASE

[61] If a defence is called and in order to earn an acquittal, the duty of the accused is only to cast a reasonable doubt against the prosecution's case. He is not required to prove his innocence beyond reasonable doubt; it is however a well-established principle of Malaysian criminal law that the general burden of

proof lays throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the accused for the offence of which he is charged.

[62] Reasonable doubt is often quoted '... it is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge. ... A reasonable doubt must be a doubt arising from the evidence or want of evidence and cannot be an imaginary doubt or conjecture unrelated to the evidence' (*Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16, Sharma J).

[63] Also in *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] 2 CLJ 10 'the doubt created must not merely be a fleeting doubt or a capricious doubt but a doubt in respect of which a substantial reason can be given'.

In this instance case, the accused raised:

(1) THE ACCUSED & TIONG KING GUAN @ ANDREW WERE ONLY FRIENDS;

(2) THE ACCUSED CLAIMED THAT THE DECEASED WHO LEFT THE DOOR UNLOCKED;

(3) THE MIDNIGHT TEXT MESSAGES PRIOR TO THE MURDER WAS SENT BY THE DECEASED WHO WAS SUSPICIOUS OF HER RELATIONSHIP WITH ANDREW TIONG KING GUAN;

(4) THE SUBSEQUENT TEXT MESSAGES TO ANDREW WAS MERELY ABOUT WORK;

(5) THE ACCUSED CLAIMED THAT SHE PAID FOR THE DOWNPAYMENT OF THE HOUSE AND THE LOAN HENCE NO FINANCIAL MOTIVES; AND

(6) SHE LOVE HER HUSBAND AND THEIR MARRIAGE.

THE ACCUSED AND TIONG KING GUAN @ ANDREW ARE MORE THAN FRIENDS

[64] The accused works as a Credit Recovery Clerk in Hong Leong Bank. Her nature of work is to make calls to account holders who are late in payment or behind in payment as well as instructing lawyers to issue a notice of demand. In this line of work, she dealt with a lot of bank's customers including Andrew. Andrew deals with second hand car sales where he would check the account status of those cars and he also acts as a runner for JPJ summonses. Aside from that, Andrew too is one of the hirer of the car loan from the bank where the accused was working. She claimed that when Andrew's payment is due, she would call him personally. From thereon, her relationship with Andrew went

A from just a customer to casual friend where she sometimes will have lunch with Andrew together with other friends. At one time, she invited Andrew, PW16 and a friend called Annie to her house. The reason for such invite was to give Annie a farewell party as she will be moving to Australia for work. The dinner proceeded until late night where she claimed that her three friends had stayed
B over for the night. The next day PW16 cooked breakfast and all of them had morning meals before they went on their separate ways for the day.

[65] This was her evidence to show that there were never instances where
C they went out just the two of them together and to show that they were just casual friends.

[66] However, PW16 testified that the accused and Andrew were having an affair and he saw them kissing . The accused denied this and said that they were
D just having a chat and watching the TV and she defended by claiming that PW16's view from his angle when she and Andrew were sitting looked as if they were kissing. Her story became more suspicious when PW16 testified that he got to know the accused from Andrew and whenever they go out together, it will be the three of them Andrew, PW16 and the accused. There were never
E instances where PW16 with Andrew alone or PW16 and the accused alone. The evidence of PW16 also establishes the fact that they were lovers because it was not the accused who had invited PW16 for the dinner but it was Andrew who had invited him and it was also Andrew who gave the direction to the accused's house. When Andrew wasn't sure of the location, Andrew had asked
F the accused for instruction. When he reached the house, he saw the accused, Andrew and another female whom he did not know. He also observed that Andrew and the accused were more than just friends as the body language indicated that they were just like boyfriend and girlfriend and PW16 is adamant with his answers.

G

[67] PW14 and accused's mother in law PW13 also testified that there was one time that they saw 'unknown cars' including a Hyundai Getz parked outside the deceased's house which PW14 found out later through the deceased that one of the cars belonged Andrew.

H

[68] For someone who is married and has in-laws living ten minutes away from the house, it was risky for the accused to be seen with Andrew alone. The dinner party which she claimed to organise was just an opportunity for her to spend time with the accused. After all PW16 did say that whenever they hang
I out, the accused will always be with Andrew. Therefore, her defence that they were just friends who only talk about work could not sustain because it is odd for someone who barely knew each other would invite them over to the house and have a sleep over what more for a married woman whose husband is away from home. Let us not forget that it was Andrew who had invited PW16 to the

house and not the accused herself. This shows that Andrew's relationship was more than just a bank customer and a casual friend. He knew where she lived and has access to her home.

The calls and text messages between Andrew and the accused

[69] It was the evidence of the accused that the calls and text messages to Andrew were merely for work purposes.

[70] However, exhs P84 and P85 showed otherwise. There was an active communication between Andrew (0168896656) and Ling Hang Tsyr (0168606393). The details are as follows:

Andrew's call log:

On the 10 June 2012 — Andrew contacted the accused three times from 10.21am–11.23pm.

On the 11 June 2012 — Andrew contacted the accused nine times from 10.56am–4.46pm.

On the 12 June 2012 — Andrew contacted the accused two times from 11.24am–1.48pm.

On the 13 June 2012 — Andrew contacted the accused 16 times from 10.08pm–11.51am.

On the 14 June 2012 — Andrew contacted the accused 11 times from 7.51am–8.59pm.

On the 15 June 2012 — Andrew contacted the accused 21 times from 10.03am–10.14pm.

On the 16 June 2012 — Andrew contacted the accused five times from 12.01am–6.15pm.

On the 17 June 2012 — Andrew contacted the accused once at 11.06am.

On the 18 June 2012 — Andrew contacted the accused four times from 7.50pm–10.27pm.

A The accused's call log

On the 10 of June 2012 — The accused contacted Andrew ten times from 9.11am–11.12pm.

B On the 11 June 2012 — The accused contacted Andrew seven times from 8.11am–9.40pm.

On the 12 June 2012 — The accused contacted Andrew six times from 8.28am–9.58pm.

C On the 13 June 2012 — The accused contacted Andrew 18 times from 8.11am–10.54pm.

On the 14 June 2012 — The accused contacted Andrew 20 times from 12.40am–1.21am.

D On the 14 June 2012 — The accused contacted Andrew eight times from 6.12am–8.56pm.

On the 15 June 2012 — The accused contacted Andrew 17 times from 1.15pm–10.14pm.

E On the 16 June 2012 — The accused contacted Andrew four times from 7.51am–7.47pm.

On the 18 June 2012 — The accused contacted Andrew once at 7.50pm.

F **[71]** Based on the phone logs above, it shows that they frequently kept in touch which is odd neither for a bank and customer relationship nor as cordial friends. The accused also did not provide an explanation for each call and text messages as in per record except she claimed that it was merely for work purposes as Andrew was her customer. Andrew must have been a special customer as the record shows that they've been communicating as early as 6am G and as late as 1.30am. Although, the actual contents are unable to be adduced as per P86 report (data can only be saved up to 60 days only), the frequency of such phone logs cannot be brushed aside. Why this customer so special? Up to 20 text messages per day? How about other customers? There was nothing to suggest that she did the same to other customer. It is therefore safe to infer that H these active communication shows that the accused and Andrew are in fact lovers.

I **[72]** It was also accused's evidence that the text and phone call with Andrew prior to the incident was to remind about the due payment. She suggested that the messages from 12.40am–1.21am were sent by the deceased who were suspicious of her friendship with Andrew. However the text messages between 6.12am–8.56pm on the same day was replied by her as it was an enquiry from Andrew about the dateline of renewal of road tax and payment of police summons. If it was indeed the deceased who took the phone and replied

Andrew's SMS between 12.40–1.21am, he may not be sleeping and will be aware about the murderer who came to the room. However, this contradicted with PW5's evidence who said that he came to the house about 12am–1am and the deceased was sleeping on the mattress on the floor. PW5's evidence is was supported by PW8, the medical attendant who testified that the body was already at the state of rigor mortise ie, he died more than an hour but less than two hour. Based on these findings, it is safe to infer that the murder took place between 12–1am. If the murder took place after 1.21am, there would be no sign of rigor mortis as PW8 reached the house at 2.05am (which is about 40 minutes after death). Therefore, it could not be the deceased who replied the text during those times; it should be none other than the accused herself.

[73] By looking at the records, ie, connections between accused and Andrew and the fact that they communicated and contacted each other even before and during the night of the incident, it is safe to infer that the accused had indeed involved in the plan to murder the deceased.

The accused claimed that the deceased who left the door unlocked but in reality it was the accused

[74] The accused claimed that she was already asleep and further claimed that her deceased husband was the last person to enter the house, the last person who took bath downstairs; last person who went to the backyard and the one who forgot to lock the door. She went on to explain that the deceased sometimes will go to the backyard of the house to hang the wet clothes, check the tank and water pump.

[75] However, in the photographs taken at the crime scene, exh P2 shows that there were no wet clothes of the deceased instead the deceased's clothes were on the living room waiting to be sent to the laundry and since there is no evidence to suggest that there was a problem with the water pump or tank hence there is no reason for the deceased to go to the backyard of the house at an ungodly hours.

[76] PW5's evidence should not be brushed aside. Of course there is no direct evidence to prove that there was an agreement between the accused and Andrew but there was an active communication which was supported by the said call log. PW5's evidence as pursuant to s 60 of the Evidence Act is that it was the accused who told Andrew that the back doors were unlock.

Q: Eearlier on when you were in the deceased's house. Can you now tell us the door of the master room?

A: The door was closed and not lock

Q: Did Andrew tell you about the door of the said room?

A: Yes Andrew told me that he received a message from the manager's wife that the bedroom door was not locked.

[77] Therefore it is safe to infer that there was an involvement of the accused in this case. It is also to be noted that PW5's answer in this respect was never challenged.

The midnight text messages prior to the murder was not sent by the deceased who was suspicious of her relationship with Andrew Tiong King Guan

[78] Guided by the case of *Public Prosecutor v Ling Tee Huah* [1982] 2 MLJ 324; [1980] 1 LNS 212: 'A mere denial without other proof to reasonable dislodge the prosecution's evidence is not sufficient'.

[79] There are about 20 text messages right before the incident. The text messages are more frequent on the day of the murder. They both also communicated right after the incident. This not only shows that they are lovers (not just some bank customer), but it also shows that there's a thread of preparation and planning. It is illogical to think that the deceased who sent those text messages because if he did, he would be alert when the murderer came into the room, taking into consideration based on the call log and the last text message sent from the accused's number to Andrew was at 1.21am and also based on unchallenged evidence of PW5 where he reached the deceased's house around 12am–1am and also based on PW8 the medical officer who examined the body of the deceased where he claimed that it was already in the state of rigor mortis (passed away more than an hour and less than two hours).

[80] There was also no evidence (no data or SMS retrievable) to suggest those text messages were about the suspicious relationship of Andrew and the accused hence it is only bare denial.

[81] Following the decision of *Mr Losali v Public Prosecutor* [2011] 4 MLJ 694; [2011] 1 LNS 501: 'The learned trial judge rightly held that the defence of the appellant was a bare denial. It is trite law that the defence of bare denial is no defence. What this amounts to is this. That the appellant did not offer any explanations to the two charges and merely denied the evidence advanced by the prosecution. That was indeed a perilous course to undertake'.

[82] Therefore this denial did not cast a doubt on the prosecution case against the appellant.

The subsequent text messages to Andrew was not about work

[83] The defence claimed that the subsequent text messages was about accused replying condolences messages from Andrew and also inquiry about the dateline of road tax renewal and payment of police summons. The situation is that, there is a death in the family and of all people, it was the accused's husband. So what is so special about Andrew that warrant him a special treatment, meaning special reminder about work from the accused. Ironically, it was only Andrew who wished condolences and asked her to take care of herself but there were no condolences messages from other friend and not even from her own family or relative. There is also no evidence to show that she also does the same to other customers she had. It appeared to the court that she only made this up. Furthermore, who in the right mind would still be returning text messages to other bank customers when her husband has just died? She should be grieving at those times. Therefore, it is safe to infer that the subsequent text messages was not about work but a post-mortem discussion from the execution of the said murder.

The accused claimed that she paid for the downpayment of the house and the loan hence no financial motives — then why sell the house?

[84] It is undisputed that the matrimonial house was bought by the accused (due to the fact that the deceased had other commitment and was not able to apply for loan) and had been sold off before the incident. It is also noteworthy that the selling of the house occurred after both of them agreed for divorce. Since it was bought by using the money that her father gave as a gift, then why need to sell it off? What more when the accused claimed that she was capable of paying the monthly instalment of the house. In her testimony she said:

Q: You said that you bought the matrimonial house, am i right?

A: Yes the money for the first payment was given by my father

Q: Why did you have to get financial assistance from your father?

A: As a gift from my father to me as he knew that i wanted to buy a house

Q: How much was the loan for the matrimonial house?

A: I forgot the amount of the loan but for the first three years there would be rm900.00 instalment every month paid by me.

[85] She also said:

Q: When the house was sold off, was it before or after the incident?

A: Since we had agreed to get divorce, so we also agreed to sold off

Q: So, it was before the incident, right?

A: Yes

Q: Why did you sold out the house?

A: Once divorced, it would be meaningless to stay at the house by my own.

A Q: When did you agree to get a divorce?

A: Probably around the month of March or April 2012, after he refused to attend the counselling course.

B **[86]** On the other hand there was a conflicting testimony by her:

Q: What happened to the housing loan after you were arrested by the police?

A: After my arrest, the matrimonial house was repossessed and sold off as there was no one going to pay for the housing instalment

C Q: What happened to the car after your late husband passed away?

A: The car was also being repossessed as no one was paying the instalment for the car loan.

D **[87]** By looking at her evidence, it is crystal clear that the accused depended on the deceased financially. The reason being, ever since the death of the deceased, the car has been repossessed since there was no one to pay for the instalment. Due to the fact that she was financially dependent on her late husband, she could not afford to lose this privilege. The murder plan was hence initiated after the deceased decided to proceed with the divorce. Therefore E there was a financial motive.

[88] In *Public Prosecutor v Hanif Basree bin Abdul Rahman* [2007] 2 MLJ 230 guided by the principle laid down in *Khoon Chye Hin v Public Prosecutor* F [1961] 1 MLJ 105b and *Mohamed bin Kasdi v Public Prosecutor* [1969] 1 MLJ 135 'if a witness demonstrably tells lies on one or two points then it is clear that he is not a reliable witness and as a matter of prudence the rest of his evidence must be scrutinised with great care and indeed with suspicion'; 'but when a witness gives or makes two statements which differs in material particulars G there must necessarily be ground for believing that he is not a truthful witness'.

[89] She also had given a conflicting testimony which is material and therefore not a witness of truth.

H *She claimed that she loved her husband and their marriage but her actions showed otherwise*

[90] Even though the accused claimed that she loved her husband, the accused did not nothing to help her husband. PW5 heard a child's cry but that I cry stopped. She was indeed very confident to stay in the same room as the murderer as if she knew the murderer would not harm her because any reasonable person in that situation would either try defending or run away as it would be suicidal for them to stay put.

[91] The accused saw the injuries and realised that the deceased's body was soaked with blood but did nothing to stop the bleeding despite the fact that she claimed to have love her husband, she also did not approach the deceased (as what she informed the court) that she was still at the bed talking to the deceased from afar nor did she immediately call the police or ambulance or run to her neighbour for help but she kept on talking to the deceased, gave him moral support and asked him where the pain was, repeatedly. She also said she was shocked and stunned but at the same time she can call her colleague and asked for the ambulance number rather than asking for help.

[92] When the there was a struggle between the deceased and the murderer, it is reasonable to feel frightened but when the danger was no longer there, there was no reason for her not helping the deceased. Most importantly, if she loved her husband, she should not have started the affair with Andrew.

CONCLUSION

[93] As per *Mohd Johi bin Said & Anor v Public Prosecutor* [2005] 5 MLJ 409; [2005] 1 CLJ 389 'in a criminal case the duty of the court is to consider whether the conviction is right. The correct approach is therefore not whether the decision is wrong but whether the conviction is safe'.

[94] After assessing the totality of the evidences of the defence and re-evaluate the evidences of the prosecution, I am left in no reasonable doubt that the accused is guilty of the offence charged. I am satisfied that the prosecution has proved its case beyond reasonable doubt.

[95] For the above reasons, I found that the accused guilty as charged.

[96] After hearing the mitigation submitted on behalf of the accused, the accused is convicted and sentenced to death by hanging to the neck until death.

Accused convicted and sentenced to death.

Reported by Nabilah Syahida Abdullah Salleh